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MOTION FILED

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SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 890

CLAYTON CHEMICAL & PACKAGING CO.,

Petitioner,

against

THE UNITED STATES,

Respondent.

MOTION BY ASSOCIATION OF THE CUSTOMS BAR, NEW YORK, N. Y. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

JOSEPH SCHWARTZ,
25 Broadway,
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Attorney for
Association of the Customs Bar,
Amicus Curiae.

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The Association of the Customs Bar, New York, N. Y. (hereinafter called the Association) respectfully moves for leave to file the attached brief *amicus curiae* in support of petitioner. The attorney for the petitioner has consented to such filing. The consent of the Solicitor General of the United States for the respondent was requested by letter dated January 5, 1966 but has not yet been obtained.

The Association is a New York membership corporation consisting of members of the bar from various sections of the United States, who are engaged in the practice of customs law before the United States Customs Court, whose jurisdiction is nationwide.

The Association is acutely interested in all questions affecting the practice of customs law.

By statute, affidavits are admissible in the trial of reappraisement cases. Section 2633, Title 28, Judiciary and

Judicial Procedure, U. S. Code (62 Stat. 980), provides in part as follows:

> "In finding the value of merchandise, in reappraisement proceedings before a single judge of the Customs Court, *affidavits* and depositions *of persons whose attendance cannot reasonably be had,* price lists and catalogues, reports or depositions of consuls, customs agents, collectors, appraisers, assistant appraisers, examiners, and other officers of the Government *may be admitted in evidence.*" (Italics supplied.)

The present case raises the question, whether the United States Court of Customs and Patent Appeals was correct in reversing the judgment of the United States Customs Court because of the purported improper admission of affidavits in evidence, upon which petitioner relied for proof of certain elements of its case, without ordering a new trial to permit petitioner to introduce oral or other evidence in lieu of the excluded affidavits.

The Association doubts that this broad issue will be adequately developed and presented by the parties because it is believed the parties will concentrate on and emphasize the facts in this particular case, rather than on the issue just set forth which is the sole interest of the Association. The Association does not intend to discuss the question of the admissibility of the affidavits in evidence.

WHEREFORE, it is respectfully prayed that this motion for leave to file the attached brief *amicus curiae* be granted.

Respectfully submitted,

JOSEPH SCHWARTZ,
25 Broadway,
New York, N. Y. 10004,
Attorney for
Association of the Customs Bar,
Amicus Curiae.

New York, N. Y., January 11, 1966.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

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against

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BRIEF OF ASSOCIATION OF CUSTOMS BAR, *AMICUS CURIAE*

Interest of *Amicus Curiae*

The Association of the Customs Bar (hereinafter called the Association) is vitally concerned with any questions which may affect the trial of cases before the United States Customs Court. Such a question is involved in this case. The Association is interested in preserving, without infringement, the statutory right of the admission of affidavits in evidence in reappraisement cases.

It is the usual practice in a reappraisement case for a party to rely upon affidavits for the proof of some or all elements of his case. If the decision in the present case

is allowed to stand, it would mean that a party introduces an affidavit at his peril. If an affidavit is found upon appeal to have been improperly admitted, there is no way to correct the failure of proof unless the case is remanded to permit the introduction of oral or other evidence in lieu of the excluded affidavit.

The proper resolution of this issue is of fundamental importance to every attorney who tries a reappraisement case before the United States Customs Court.

ARGUMENT

In the interest of elemental justice the United States Court of Customs and Patent Appeals should have remanded the case for a new trial.

By its decision the Court below, after holding that the affidavits, Exhibits 7 through 20, were improperly received in evidence, has closed the door to any possible effort which the petitioner might have made to supply oral or other evidence to prove the facts contained in the excluded affidavits. It is submitted that this was contrary to elemental justice.

The Court below, after holding that without the affidavits in question the petitioner had not sustained its burden of proof, *reversed* the cause. Under analogous conditions the Court below has *remanded* cases to the Customs Court for further proceedings. See, e.g., *United States* v. *Eurasia Import Co., Inc.*, 33 CCPA 123, 131, C.A.D. 326 (1946); *United States* v. *Semon Bache & Co.*, 25 CCPA 387, 395, T.D. 49466 (1938); *United States* v. *Fisher Scientific Company*, 40 CCPA 164, 170, 171, C.A.D. 513 (1953).

The Customs Court, sitting in Appellate Term, has likewise under similar circumstances *remanded* cases to give the parties an opportunity to supply the missing elements of proof. See, e.g., *United States* v. *Berben Corporation*,

49 Cust. Ct. 497, 505, A.R.D. 147 (1962); *United States* v. *Hensel, Bruckman & Lorbacher, Inc.*, 2 Cust. Ct. 846, 847, Reap. Dec. 4523 (1939).

Judges of the Customs Court, sitting in reappraisement cases, have also followed the same course in furtherance of the ends of justice. See, e.g., *Empire Distributors, etc.* v. *United States*, 24 Cust. Ct. 609, 613, Reap. Dec. 7827 (1950).

The Court below has departed from the foregoing practice in cases where *all the relevant facts are contained in the record.* Under such circumstances a new trial would of course not be warranted. See, e.g., *United States* v. *H. W. Robinson & Co.*, 25 CCPA 395, 403, T.D. 49484 (1938). Without the affidavits which the Court below has excluded in this case, the record does not contain all the relevant facts.

Conclusion

The Court below, in furtherance of the ends of justice, should have given the petitioner an opportunity to supply the void in its proof resulting from the holding that the affidavits in question were improperly received in evidence by the Customs Court.

WHEREFORE, the petition should be *granted.*

Respectfully submitted,

JOSEPH SCHWARTZ,
25 Broadway,
New York, N. Y. 10004,
Attorney for
Association of the Customs Bar,
Amicus Curiae.

New York, N. Y., January 11, 1966.